

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN RE:

[REDACTED] and [REDACTED] on behalf
of their daughter [REDACTED],

Petitioners,

v.

SHELBY COUNTY SCHOOL SYSTEM,

Respondents.

No. 03-47

ORDER

Patty K. Wheeler
Administrative Law Judge
P.O. Box 2231
Knoxville, TN 37901-2231

Attorney for School District
Timothy W. Smith, Esq.
Smith Sheahan
2670 Union Extended, Suite 1200
Memphis, TN 38112

[REDACTED] and [REDACTED], pro se
[REDACTED]
Millington, TN 38053

[To protect the confidentiality of the minor Student, [REDACTED] will be referred to as "Student" on all remaining pages of this decision and Students' Parents will be referred to as "Parents."]

OFFICE OF LEGAL SERVICES

NOV 04 2003

**DIVISION OF
SPECIAL EDUCATION**

A Due Process Hearing was requested by Parents on behalf of the Student on August 27, 2003. On August 29, 2003 the Division of Special Education, Tennessee Department of Education appointed this Administrative Law Judge to hear the case. Originally, the 45-day Rule was not waived, however, at the Hearing of this matter on September 29, and September 30, 2003 the parties agreed to waive the 45-day Rule as it related to the entry of the Order.

A pre-hearing conference call was held on Friday, September 12, 2003 and subsequently on September 15, 2003 a pre-conference letter of Agreement was issued. At the request of the parties, a second pre-hearing conference call was held on September 19, 2003 to clarify production of documents and other issues relating to the hearing. (Administrative Law Judge's file Collective Exhibit 1).

INTRODUCTORY INFORMATION:

The case was heard at the Shelby County School office in Memphis, Tennessee on September 29 and September 30, 2003. At the close of the hearing, counsel for the school and the Parents agreed to submit post-hearing Findings of Fact and Conclusions of Law on or before October 20, 2003. A final opinion was to be rendered the week of October 27, 2003.

PROCEDURAL HISTORY:

The Parents initiated the request for the hearing pursuant to the Individuals With Disabilities Education Act 34 CFR 300.1 et. seq. The request for a Due Process Hearing was filed by the Parents based on their disagreement with the IEP and its placement of the

Student in a self-contained pre-school setting for the greater part of the school day. The Parents asked for an IEP that placed the Student in a regular kindergarten class with special education support services and a full-time aide. Since the Parents were challenging the Individual Educational Plan the burden of proof was on the Parents to prove by a preponderance of the evidence that the Individualized Education Plan (IEP) proposed by the school violated the Individuals with Disabilities Education Act (IDEA) and did not provide the Student with a Free Appropriate Public Education (FAPE).

McLaughlin v. Hold Public Schools Bd. of Educ., 320 F. 3d 663 (6th Cir 2003) citing 20 U.S.C. §§ 1412(a)(1) (A)(5); 1414 (d)(1)(A,B); 1415 (b)(6).

WITNESSES:

Parents subpoenaed one witness, Jenness Roth, for the hearing and requested the school to make available all individuals who attended the IEP meetings.

There were 11 school system employees who presented testimony at the Due Process Hearing. All witnesses were questioned by Parents and Timothy A. Smith, counsel for Shelby County Schools. The witnesses were as follows:

Jenness Roth, Assistant Director of Support and Training for Exceptional Parent (STEP). STEP is an organization funded under IDEA to provide Parent training and support to families with children with disabilities so that they can understand what their rights and responsibilities are within the school system. (Tr. pp. 75-109)

Tanya Mabry, Principal of E. A. Harrold Elementary School in the Shelby County School System. Principal of the school in which Student has been placed. (Tr. pp. 110-147)

Janet Panter, Ph.D. School Psychologist who reviewed all prior tests results of Student, evaluated Student and attended all IEP meetings. (Tr. pp. 148-284)

Lajuana Vaughn, Kindergarten teacher at E. A. Harrold for regular Kindergarten Students. Student was included in Ms. Vaughn's regular Kindergarten class for some period of time each school day. (Tr. pp. 285-324)

Allison Gore, Language and Speech Pathologist for Shelby County School Systems at the E. A. Harrold Elementary School. Reviewed all prior evaluations of Student, evaluated Student, and provided speech and language therapy services 30 minutes three times a week for Student. (Tr. pp. 335-371)

Clancey Patterson, Special Education Teacher for Shelby County School System at the E. A. Harrold Elementary School. Teacher for the self-contained pre-school Communication Disorders Class (CDC) to which Student was assigned. (Tr. pp. 372-417)

Ron Lloyd, Special Education Supervisor for Shelby County School System. The 2nd highest position in the Department of Special Education of Shelby County Schools. (Tr. pp. 418-439)

Amanda Compton, Curriculum Coordinator for Shelby County Schools at E. A. Harrold Elementary. (Assistant Principal). Observed Student in classroom and attended IEP meetings for Student. (Tr. pp. 448-490)

Janet Bossert, Assistant and Aide in Clancey Patterson's Special Education Pre-School classroom at E. A. Harrold. Attended all classes in the regular education classroom with Student and worked one on one with Student. (Tr. pp. 491-503)

Michele Nowak, Behavior Consultant for Shelby County School System at E. A. Harrold Elementary School. Worked with and observed Student in both classrooms and attended IEP meetings for Student. (Tr. pp. 504-528)

Jo Bellanti, Director of Special Education for Shelby County Schools. (Tr. pp. 529-558)

Parents also testified and responded to questions from the Administrative Law Judge.

All witnesses were found to be credible. The extent of their training experience and expertise as well as their direct experience with the Student were primary elements considered in determining the weight given to each individual's testimony and to the recommendations made. Since, Ms. Jenness Roth had not seen Student nor worked with

Student her observations concerning placement were noted but were given less weight than those of the individuals who had actually worked with or observed Student in the school setting.

ISSUE:

Whether Student was and is being provided a Free and Appropriate Public Education as set forth in the September 12, 2003 IEP developed to meet the special needs of the Student pursuant to 20 U.S. C. §1401 (a)(18). (Sept. 12, 2003, IEP Collective Exhibit 1 and Exhibit 39)

INTRODUCTION: TO FACTS

This was an emotionally charged controversy implicating the love of Student's Parents for her as well as their efforts to ensure that she receive the best education for her intellectual, social, emotional and physical development; the desire and duty of experienced educators to offer the child the best placement for her needs as they understand them; and the conflicting interests of parents and educators having the final word regarding the manner of Student's schooling.

Further fueling the charged nature of this case were disagreements about the nature and extent of Student's abilities. The Parents observed learning behaviors of the Student in the home setting and social settings that the educators did not see in their observations and evaluations of the child at school. (Exhibit 2 videotape of Student; testimony of parents Tr. pp. 182-185]; (Panter testimony Tr. pp. 227-228; Panter testimony Tr. pp. 158-163; 186-195; 205-207; Gore testimony Tr. pp. 357-359; Patterson testimony Tr. pp. ____; Bellanti testimony Tr. pp. 540-541; 547-551).

Because of the emotional nature of this case, the parties are reminded that the opinion and decisions herein rest on a careful consideration of all the facts presented and the legal arguments made by both the Parents, who organized their presentation well and are to be commended, as is the able counsel, Tim Smith, who represented the school system.

FACTS:

Student is a 5 ½ year old girl who attends E. A. Harrold Elementary School. She is eligible for Special Education Services by virtue of a diagnosis of Autism Spectrum Disorder, including severe language delays, impaired social skills, and limited pre-academic skills. (Panter testimony Tr. pp. 179 - 213; Exhibit 21; Exhibit 22; Exhibit 23; Exhibit 24; Exhibit 27).

Student was born May 7, 1998 after a full-term pregnancy. She received oxygen and was jaundiced at birth (Exhibit 22; Exhibit 23.) She reportedly met her developmental motor milestones at appropriate ages, but showed delays in language skills. Parents reported at 18 months that Student's language skills were not progressing and she began to exhibit "autistic-like" behaviors. Student was enrolled in Early Childhood Intervention at 24 months of age and then was enrolled in a Pre-School Program for Children with Disabilities (PPCD). Parents were in the Army and stationed at Aviano, Italy when Student was born May 7, 1998. In February 2002, they returned to the states. (Exhibit 21; Exhibit 22; Exhibit 23; Exhibit 24).

Medically, Student experienced recurrent difficulties with ear infections until she received pressure equalization tubes in November 2000. She also had difficulties with

colitis and continues to have problems with allergies and eczema. Student takes medications to treat allergies and is on a special diet. (Exhibit 22; Exhibit 23; Exhibit 24); (Panter testimony Tr. p. 228.) Although no medical doctor testified, Parents stated that Student has also been diagnosed with Pyroluria. (Parents testimony Tr. pp. 166-169; Exhibit 19).

Upon return to the United States in 2002, Student attended North Polk Elementary School in Louisiana and was in the special pre-school program. Student was evaluated by the Vernon Parish Pupil Appraisal Service, Louisiana Public Schools in January and February of 2003. Her prior diagnoses from (a) the Callier Communication Center at the University of Texas done in July 2002 was Pervasive Developmental Disorder - Not otherwise specified with Mixed Receptive-Expressive Language Disorder and Developmental Articulation Disorder. (Exhibit 21); and (b) the findings of the evaluation by the Brooke Army Medical Center Multi-disciplinary Team in July 2002 was Suggestive Autism Spectrum Disorder. (Exhibit 22). Both recommended a special structured educational setting with emphasis on language development.

The findings of the 2003 evaluation done at the Vernon Parish Pupil Appraisal Services were consistent with prior evaluations. It was the consensus of the Team that the Student met the criteria for the classification of Autism. Student exhibited a severe language impairment. (Exhibit 24), delays in self-help dressing, social, expressive language, receptive language, pragmatic language, articulation, and perceptual/cognitive development. Her strengths included her cooperation (with encouragement), voice, fluency, gross motor skills, fine motor skills, toileting skills, eating skills, her imagination,

and her Parents' support (Panter testimony Tr. pp. 214-215). The Team made a number of recommendations one of which was the need for a very structured educational environment. At that time, Student's overall school readiness concept age was 2 years, 11 months with a chronological age 4 years 9 months.

The Student's educational history reveals that she was enrolled at North Polk Elementary in the pre-school program with special education services. She was mainstreamed and attended regular classes there in music, library and physical education. She also received speech therapy services. The Louisiana IEP indicates that Student spent 305 minutes a week in special ed and 28 minutes a week in mainstreamed education. (Panter testimony Tr. p. 213). Student reportedly made satisfactory progress in the pre-school program. (Exhibit 24).

The most recent speech and hearing evaluation, conducted by Germantown Speech and Hearing Clinic on August 27, 2003, findings substantiated previous evaluations. Based on the scores obtained, Student continues to present a severe mixed receptive/expressive language and articulation disorder. A program of speech and language therapy of at least 2 times a week was recommended. (Exhibit 26). The findings of the evaluations conducted by the Shelby County School System educators were consistent with the other evaluations. (Panter testimony Tr. pp. 224; 231; Gore testimony Tr. pp. 357-360).

NATURE OF DISORDER OF STUDENT:

Student continues to be classified as a child with Autism Spectrum Disorder. "Autism" refers to a developmental disability, which significantly affects verbal and

nonverbal communication, and social interaction, generally evident before age three (3), that adversely affects a child's educational performance (Panter testimony Tr. pp. 170-171). Other characteristics often associated with Autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (Panter testimony Tr. pp. 180-182; Nowak testimony Tr. p. 506).

The term "Autism" may also include students who have been diagnosed with Autism Spectrum Disorder, Pervasive Developmental Disorder - not otherwise specified (PDD-NOS) or Asperger's Syndrome. As a result of these disorders, the child's educational performance is adversely affected. It may also include a diagnosis of Pervasive Developmental Disorder such as Rett's or Childhood Disintegrative Disorder. Autism may exist concurrently with other areas of disability. (Rule Making Hearing Rules of the State Board of Education, Chapter 0520-1-9, Special Education Programs and Services).

Student came to Shelby County Schools with this extensive background information prior to her enrollment. However, as this was Student's first year in the Shelby County School System, an IEP Team meeting was held on August 8, 2003 at E. A. Harrold Elementary School to determine Student's eligibility for special education and related services and to develop an Individualized Education Plan (IEP) uniquely tailored to address the child's needs. There were 11 or 12 educators at the meeting which lasted approximately two hours. (Panter testimony Tr. pp. 217-218). The Parents attended the IEP Team meeting and acknowledged that they were informed of and understood their child's rights as her Parents. They received a copy of the Right's Brochure. The IEP Team

also provided an explanation of the Parents' rights at each IEP Team meeting. (Lloyd testimony Tr. pp. 423-424; 431-435; Bellanti testimony Tr. pp. 544-546; and Informed Parent Consent form of August 8, 2003 Exhibit 40).

Prior to the August 8, 2003 IEP Team meeting, the school psychologist, Dr. Janet Panter, reviewed all prior evaluations performed on Student in order to present the information to the IEP Team. (Panter testimony Tr. pp. 179-271).

At the August 8th meeting, the IEP Team developed a "Thirty day" IEP to give the staff an opportunity to get to know Student and to observe her in the school environment in the CDC class and in the regular kindergarten class. The school also wanted to perform psychological and speech and language evaluations to determine whether the prior evaluations were indicative of the child's current abilities. This was even more important as the Parents reported that there had been an "explosion" of Student's language development in the last few months. (Panter testimony Tr. p. 217; Bellanti testimony Tr. p. 547).

The IEP Team agreed to a temporary placement in a pre-school CDC classroom with limited participation in a regular education kindergarten. The Parents gave their permission for the proposed IEP at that meeting. (Panter testimony Tr. pp. 217-219; Lloyd testimony Tr. pp. 433; Exhibit 40).

By August 19, 2003 Parents requested another IEP Team meeting. In response to the request, a second IEP Team meeting was convened on August 27, 2003. Approximately 11 or 12 educators attended that meeting which lasted approximately 1 ½ to 2 hours. (Exhibit 39). At that meeting Parents expressed their concern that they did not

feel that the Student should be evaluated before she entered a regular Kindergarten class. The Parents wanted Student to be included immediately in the Kindergarten full time with a full time aide. (Lane testimony Tr. pp. 243-244; Panter testimony Tr. pp. 256-258; Bellanti Tr. pp. 550-557). In response to Parents' request for full inclusion of Student in the Kindergarten program, Ron Lloyd, a Special Education Supervisor with 30 years experience in Special Education, testified that it would have been inappropriate and counter-productive to fully include Student in light of the prior evaluations. (testimony of Lloyd, Trp. 434). Dr. Panter testified that it would have been irresponsible to fully include the child in August 2003, in view of the evaluations which had been provided. It was incumbent on the A. E. Harrold IEP Team to have the updated evaluation results to appropriately place Student. (Panter testimony Tr. p. 215).

At the August 27, 2003 IEP Team meeting, the Student's teachers expressed their concern that full inclusion in the regular Kindergarten class was not appropriate for Student in light of her current abilities. All agreed that such a setting could be harmful to the Student's progress. (Minutes of 8/27/03 IEP Team meeting Collective Exhibit 1; Exhibit 39; Vaughn testimony Tr. pp. 286-287; 304 & 308; Patterson testimony Tr. pp. 338-390; 401; Bellanti testimony Tr. pp. 537-539).

The August 27, 2003 IEP team decided to maintain Student's placement which was predominately in the CDC pre-school setting with limited placement in the regular Kindergarten class for a portion of the day in order for them to further observe Student in those settings. This placement was to remain the same until the speech and psychological evaluations were completed and the Team could reconvene on September 12, 2003. At

the September 12th meeting, the results of those evaluations would be reviewed and the Team would determine where Student could receive the most appropriate educational services – whether it would be full inclusion in a regular education kindergarten classroom or placement in the CDC classroom with additional support services and partial inclusion in Kindergarten class. (Mabry testimony Tr. pp. 111-113; Panter testimony pp. 253-257; Gore testimony Tr. pp. 362-363; Vaughn testimony Tr. pp. 286-287; 304 & 308; Exhibit 39).

At the conclusion of the August 27, 2003 IEP Team meeting, Parents presented a Due-Process Hearing Request Form which they had prepared prior to the IEP meeting to the school staff. (Bellanti testimony Tr. pp. 544-546). After receipt of the Notice requesting a Due Process Hearing, Ms. Bellanti provided the Parents with an additional expanded rights brochure which explained the parents rights, due process and mediation and included a list of low cost legal providers. The packet of information also provided a Special Education Mediation Request Form. (Bellanti testimony Tr. pp. 544-546; and Parent Responsibilities introduced as Exhibit 45).

Parents were given appropriate notice of the September 12, 2003 IEP Team meeting. Parents contacted the school attorney and advised that they would not attend the September 12, 2003 meeting and they were advised that the meeting would nonetheless proceed pursuant to State Board of Education Rules. (Exhibit 28). The Shelby County School System further advised Parents that they would stand by the September 12, 2003 IEP at the subsequent Due Process Hearing as providing the Student a free and appropriate public education. (Panter testimony Tr. pp. 253-254; correspondence from Attorney for Shelby County Schools dated September 9, 2003 introduced as Collective

Exhibit 1).

Dr. Panter, the school psychologist, evaluated Student on September 2, 2003. At that time, Dr. Panter administered a number of tests including the School Readiness Composite (SRC) of the Bracken Basic Concept Scale Revised. The SRC scale is designed to measure a child's receptive language skills when presented with basic school readiness concepts. The Student earned a scaled score of 2 which ranks below the first percentile and is classified as very delayed. In comparison to other children of the same age, the Student's knowledge of concepts that are predictive of school readiness and success were very limited. (Panter testimony Tr. pp. 149; 190; Exhibit 27).

The speech and language therapy evaluation was partially completed by Ms. Gore, the Speech and Language Pathologist. The speech evaluation was based on a Parent questionnaire completed by Student's mother, independent tests, teacher observations, and the examiner's direct interactions with the Student. Ms. Gore was not able to complete the evaluation due to Student's absence. Ms. Gore diagnosed the Student with communication delay secondary to her primary handicap and condition, Autism, and recommended language therapy to aid in the development of communication skills. (Gore testimony Tr. pp. 351-355; Shelby County Speech Evaluation and Vernon Parish Speech-Language Assessment introduced as Collective Exhibit 26).

On August 29, 2003 an independent speech evaluation of Student was performed by Germantown Speech and Hearing Clinic. The evaluation concluded that Student present severe mixed receptive/expressive language disorder and an articulation disorder. It was recommended that the Student receive speech and language therapy twice weekly.

The evaluation was consistent with the findings and recommendations of Ms. Gore and other previously completed evaluations of Student. In fact, Ms. Gore recommended three thirty minute language therapy sessions a week. (Germantown Speech & Hearing Clinic Evaluation Exhibit 26; Gore testimony Tr. pp. 357 - 362).

On September 12, 2003, the eleven member IEP Team met to review the language, speech and psychological evaluations along with teacher observations in order to develop the most appropriate IEP and determine a permanent placement for Student for the remainder of the school year. Although the Parents did not attend the meeting, their wishes for full inclusion were addressed and fully discussed at the September 12, 2003 meeting. Contrary to Parents' belief, it is clear that the placement decision concerning the Student had not been pre-determined before the September 12, 2003 meeting. (Mabry testimony Tr. pp 111-113; Panter testimony Tr. 253-257; Nowak testimony Tr. pp. ____; Exhibit 30). In addition to discussing the Parents' wish for full inclusion for Student, the Team also addressed the Parents' observations regarding Student's abilities and how those differed from observations made by the school personnel. Ms. Gore, the Speech and Language Pathologist, discussed the Parents' concerns with Student's spoken language skills and noted particularly the immature sentence patterns Student used. (September 12, 2003 IEP Team Minutes Exhibit 30; Panter testimony Tr. pp. 255-256).

Ms. Vaughn, the regular Kindergarten teacher into whose class the Student was mainstreamed, made the following comments at the Due-process Hearing.

"I think at this point Student needs some intense instruction. She is missing or has not developed some of her pre-kindergarten readiness skills that we would expect to see at this point, and I feel that it would be in her best

interest to have some small group, one-on-one instruction to master those skills, and it needs to be intense.

In my class, I have 23 children. Student would make 24. We do .. in kindergarten, we do group instruction. We move from our .. my room is divided into two areas, and we have a carpeted area where I do instruction, and then I have tables where there's 4 or 5 children at a table.

So it's a fairly large room, and we have lots of movement, and at the table, there's 4 to 5 children at each table, which is .. can be very distracting, and in a large group setting children with Autism tend to become overstimulated and will withdraw within themselves.

I think that Student would best be served to work on her skills in a pre-school environment." (Vaughn testimony Tr. pp. 295-296; 322).

Ms. Vaughn, evaluated Student and reported that Student had scored a 28.5/100 on the Kindergarten Brigance Screening during her first week in Kindergarten. This indicated that Student had not mastered the basic Kindergarten readiness skills and was a very low score for participation in Kindergarten. (Vaughn testimony Tr. pp. 291; Exhibit 30)."

Further discussion during the September 12, 2003 IEP Team meeting included statements by Ms. Patterson, Student's Special Education Classroom teacher who observed that Student had only met one of her 30-day goals. Ms. Patterson expressed a concern that the academic goals had not been met due to the lack of adequate instructional time in the pre-school setting. (Patterson testimony Tr. pp. 403-404. Ms. Patterson requested more time to work with Student based on Student's difficulty meeting academic goals. It was the consensus of the IEP team that Student needed the structured environment and the support that would be provided by the special education teacher. (Panter Testimony Tr. pp. 215-216; 239; Nowak 514-520).

Ms. Patterson, the teacher for the Special Education CDC self-contained classroom testified as follows:

"She could, in my opinion, best be served in a pre-school classroom where the numbers are lower, where we do a lot of the same kindergarten skills.

"I have .. this year I have 9 children. Two of them come half days. So there are 8 children in there including Student.

I have two assistants. We run a lot of the same programs they run in kindergarten....

We have centers like they do in kindergarten where the kids break up and play in certain areas. We have a calendar like they do in kindergarten, and we work on many kindergarten skills.

Of my 8 kids this year, 4 of them are going to regular kindergarten next year.

So I mean, she has good peers to talk to and to listen to. So I feel very strongly that Student should achieve many things with the children that are going to go to kindergarten next year. (Patterson testimony Tr. pp. 389-390).

Ms. Patterson continued her testimony by stating although she had not had Student for a long period of time, that....

"In my opinion, what is best for Student is to do as much as we can now to get her ready to learn, to teach her her math skills, to teach her how to read. That is in my opinion, what is best for her.

She does need to be around her peers. She absolutely does. I do not dispute that at all, but I feel the last IEP (September 12, 2003) gave her good time in kindergarten, centers and calendar and speciality classes that she can be with her peers."I believe it is best for her to be in a smaller setting with more help." (Patterson Tr. pp. 413-414)

Another individual who worked closely with Student was Janet Bossert, a Special Education Assistant, who accompanied the Student to the regular education kindergarten class each time Student went to the regular Kindergarten class. Ms. Bossert testified that

Kindergarten was not a good place for Student because she was overstimulated in the Kindergarten class, often appeared unhappy in that setting and was unable to complete the exercises even with ongoing prompting from Ms. Bossert. Ms. Bossert stated that she often would have to heavily assist the Student using a "hand over hand" technique in the Kindergarten class. This meant that essentially Ms. Bossert was doing the work guiding the child's hand. More strikingly, Ms. Bossert observed that she saw a noticeable improvement in the Student's demeanor and mood when she returned from the Kindergarten class to the CDC pre-school class. Ms. Bossert stated that she simply did not believe that the Student would be able to do the work, even with a full-time aide, in the Kindergarten class. She described her observations of the Student and stated that when the Student seemed to be overstimulated or overloaded she would simply "shut down" or withdraw because there seemed to be too much going on around her. (Bossert testimony Tr. pp. 494 - 502).

The team thus recommended that the Student's participation in the regular education kindergarten be reduced to 8 hours a week in order to provide sufficient instructional time to meet the IEP goals. It was further decided that the Student would not participate in computer lab instruction with the kindergarten class. (Nowak testimony Tr. pp. 514-520; Exhibit 30). The Team then reviewed the regular kindergarten schedule to choose specific activities for the Student to participate in that were the most appropriate. The Team wanted to allow Student an opportunity to be included in the regular education curriculum to the maximum extent appropriate. The IEP Team recommended that the Student attend calendar and group time and participate to some degree in "Centers",

library, music, art and physical education with the regular kindergarten class each week. (Panter testimony Tr. pp. 172-175; 233-242; 247-269; Exhibit 30).

In addition to viewing a videotape of Student offered by the Parents, observing witnesses and listening to testimony the Court reviewed hundreds of pages of exhibits which included the Evaluations of Student which were discussed by witnesses as well as minutes of the three IEP meetings and observations by teachers of Student.

There was no doubt that both the Parents and the school personnel had as their primary goal the determination of the most appropriate education for the Student. The controversy arose due to differences in how and where that could best be achieved.

CONCLUSIONS OF LAW & DISCUSSION:

The Individual with Disabilities Education Act (IDEA) was enacted in part to "assure the effectiveness of efforts to educate children with disabilities." 20 U.S.C. §1400(c). The Act emphasizes Special Education and related services, and provides funding for local school district programs. Regulations adopted pursuant to the IDEA, set forth the details of the program. 20 U.S.C. §1417(b). Local school districts must comply with federal regulations in order to receive federal funding assistance, which is administered through the state agencies.

The IDEA requires defendants to provide Student with a Free Appropriate Public Education (FAPE). 20 U.S.C. §1401(a)(18). However, a "Free Appropriate Public Education" is not necessarily the best possible education or one that maximizes the potential of each child with disabilities, or one that is in some sense (difficult to define) "equal" to the education provided to children without disabilities. The requirement is that

the education to which access is provided must be sufficient to confer some educational benefit on the handicapped child. Board of Education of Hendrick Hudson Central School District v. Rowley, 485 U.S. 176, 102 S.Ct. 3034 (1982).

In construing the IDEA's requirement of a Free Appropriate Public Education, the federal courts repeatedly have emphasized that public schools are not required to maximize a disabled student's educational potential. Wilson County School Sys. v. Clifton, 41 S.W. 3d 645, 650 (Tenn. App. 2000). The IDEA provides no more than a "basic floor of opportunity." Wise v. Ohio Dept. of Ed., 80 F 3d 177, 185 (6th Cir. 1996).

A "Free Appropriate Education" is one that provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Rowley, 458 U.S. at 203. The concept of an "Individualized Education Plan" (IEP) provides the primary vehicle for implementing the goals of the IDEA. Honig v. Doe, 484 U.S. 305, 311, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1988). The regulations require state educational agencies to ensure the development and implementation of an IEP for each child with a disability. 34 C.F.R. §300.341.

The IDEA imposes a presumption in favor of "mainstreaming." It requires mainstreaming to the "maximum extent appropriate". See 20 U.S.C. §1412(5)(B). A state receiving funds under the IDEA must ensure that "special classes, separate schooling, or other removal of handicap children from the regular educational environment occurs only when the nature or severity of the handicapped is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412(5)(B). The Act however does not provide any substantive standards for

striking the proper balance between its requirement for mainstreaming and its mandate for a Free Appropriate Public Education.

When parents challenge the appropriateness of a program or placement offered to their disabled child the school district under the IDEA, the Administrative Law Judge must undertake a twofold inquiry. Bd. of Education v. Rowley, 58 U.S. 176, 206-07 (1982). First, the Court must ask whether the school district has complied with the procedures set forth in the IDEA. Second, the Court must determine whether the IEP, developed through the IDEA's proceedings, is reasonably calculated to enable the child to receive educational benefits. There is no violation of the IDEA so long as the school district has satisfied both requirements. Rowley.

Courts as a threshold matter, determine whether the school system has complied with the mandated procedures. Board of Education v. Rowley, 453 U.S. 176 (1982). Procedural flaws do not automatically require a finding that a school system has denied a child a free appropriate public education. However, procedural flaws that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a free appropriate public education. W.G. v. Board of Trustees of Target Range School District, 960 F. 2d 1479, 1483 (9th Cir. 1992). Further, the Sixth Circuit has held that technical defects do not result in a violation of the IDEA if there is no substantive harm. Thomas v. Cincinnati Board of Education, 918 F. 2d 618, 624 (6th Cir. 1990). Any perceived difficulty with procedural issues which do not rise to a level of actual violations for which a remedy may exist because the school system has substantially complied with the Individuals with Disabilities

Education Act (IDEA) fail. Cordrey v. Euckert, [917 F.2d 1460, 17 EHLR 104 (6th Cir. 1990), cert. den. 111 S. Ct. 1391 (1991)]. It would be inappropriate to "exalt form over substance" by holding that alleged technical deviations rendered the school system liable. Doe v. Defendant I, [898 F. 2d 1186, 1190-91 (6th Cir. 1990)]. Finally, only harmful violations described in Doe v. Alabama State Department of Education, [915 F. 2d 651 (11th Cir. 1990)] would entitle a child to relief.

Parents are to be given written notice whenever a school system either proposes to change or refuses to change the child's evaluation, educational placement or the provision of a free appropriate public education to the child. This the school did. The Shelby County School district provided the Parents with a copy of the minutes of the three IEP team meetings. The Parents participated in the discussions and deliberations of two of the three IEP meetings held.

The Parents received notice of the third IEP meeting held on September 12, 2003 but elected not to attend. The minutes of the September 12, 2003 IEP meeting reflect that the concerns of the Parents were fully discussed. The Parents request for Student's full inclusion in a regular Kindergarten class with a full-time aide were discussed and evaluated in the IEP team meeting. After a full discussion of all of the pertinent information, the team recommended continued placement in the pre-school CDC classroom with mainstreaming or inclusion in certain subjects and activities in the regular Kindergarten class.

The Rowley court stressed that participation by all parties in the IEP process would, in most cases, ensure that what Congress wanted in the way of substantive content would make its way into an IEP. Further, states and school districts should be afforded discretion

in determining what type of program is appropriate based on the individual needs of a disabled child. McLaughlin v. Holt Public Schools Board of Education, 320 F. 3d 663 (6th Cir. 2003) *citing* Burilovich v. Board of Educ. of Lincoln Consol. Sch., 208 F. 3d 560, 566 (6th Cir. 2000)(“The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs, was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child”).

If the school has complied with the procedural requirements of the IDEA and developed an individualized educational program developed through the IDEA procedures that is reasonably calculated to enable the child to receive educational benefits, the requirements of the IDEA have been met and the courts can require no more. Zelazny, 325 F.3d at 729.

The IEP developed on September 12, 2003 provides Student a free and appropriate public education

Student needs intensive attention and instruction specifically tailored to address her unique, individual needs. Parents agreed that Student needed special education services. The September 12, 2003 IEP provides Student with personalized instruction with sufficient support services to permit her to benefit educationally. The September 12, IEP is sufficient to ensure that Student will receive an educational benefit from her IEP training. Thus, in consideration of Student’s individual and unique needs, the September 12, IEP provides her with an appropriate educational placement with the necessary specialized services.

Under the IDEA, Shelby County is not charged with maximizing a child’s potential

nor is it obligated to provide the “best possible” educational experience for a child with a disability. The duty imposed by law is for the school to develop an individualized education plan for a child with a disability that provides the child with some educational benefit. In light of the fact that an appropriate public education under the IDEA does not mean the absolutely best or potential maximizing education for the individual child, a court’s review must focus primarily on the District’s proposed placement, not on the alternative that the family prefers. Tucker v. Calloway County Bd. of Educ., 136 F. 3d 495 (6th Cir. 1998).

The burden of proof is on the parent to prove by a preponderance of the evidence that the individualized education plan proposed by the school violates the IDEA. McLaughlin v. Hold Public Schools Bd. of Educ., 320 F. 3d 663 (6th Cir. 2003) citing 20 U.S.C.A. §§ 1412(a)(1)(A)(5), 1414(d)(1)(A, B), 1415(b)(6); Knable v. Bexley City School Dist., 238 F.3d 755 (6th Cir. 2001). In the instant case, the Parents failed to prove by a preponderance of the evidence that Shelby County has denied Student a free and appropriate public education. The overwhelming weight of the evidence supports a finding that Shelby County has provided Student a free and appropriate public education.

While Student may at some point be able to succeed in a regular education setting, perhaps with modification, now is not the appropriate time. It is the hope and goal of everyone, Parents and educators, who work with Student that the intensive early intervention provided Student will make this goal a reality.

ORDER

IT IS HEREBY ORDERED that Shelby County School Systems September 12, 2003 IEP for Student is appropriate and meets the legal mandates of the IDEA.

IT IS FURTHER ORDERED that Shelby County School System is the prevailing party.

This decision is binding on both parties unless the decision is appealed. Any party aggrieved by this decision may appeal to the Chancery Court for Shelby County, Tennessee, or may seek review in the United States District Court for the District in which the School System is located. Such Appeal or review must be sought within sixty (60) days of entry of a final order. In appropriate cases the reviewing court may stay this final order.

IT IS SO ORDERED this 31st day of October, 2003.


Patty K. Wheeler, Administrative Law Judge